UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MONTANA

In re **WILLIAM O WILLIAMS,** and **LORI J WILLIAMS**, Debtors.	Case No. **05-62358-7**

MEMORANDUM of DECISION

At Butte in said District this 23rd day of September, 2005.

In this Chapter 7 bankruptcy, after due notice, a hearing was held August 23, 2005, in Billings on the United States Trustee's Motion to Dismiss Pursuant to 11 U.S.C. § 707(b) filed July 19, 2005, together with Debtors' objection thereto. Neal G. Jensen, Assistant United States Trustee, appeared at the hearing, as did Debtors' counsel of record, Dane C. Schofield. No testimony or exhibits were offered at the hearing. The Assistant U.S. Trustee and Debtors' counsel agreed that there are no disputed issues of fact. Debtors' counsel merely requested an additional ten days within which to file a reply to the United States Trustee's "Reply Memorandum in Support of Motion to Dismiss Pursuant to 11 U.S.C. § 707(b)" filed August 5, 2005. The Court granted the request made by Debtors' counsel and on September 2, 2005, Debtors filed their "Second Reply to Trustee's Objection." The matter is thus ready for decision. This Memorandum of Decision sets forth the Court's findings of fact and conclusions of law.

Debtors filed a voluntary Chapter 7 bankruptcy petition on September 21, 2004, commencing bankruptcy case number 04-62923-7. In case number 04-62923, the U.S. Trustee

filed a "Motion to Dismiss Pursuant to 11 U.S.C. § 707(b)" on April 25, 2005. In accordance with Mont. LBR 9013-1, the U.S. Trustee's Motion to Dismiss was accompanied by a Notice provision which advised Debtors:

> If you object to the motion, you must file a written responsive pleading and request a hearing within ten (10) days of the date of the motion.
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> * * *
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> If no objections are timely filed, the Court may grant the relief requested as a failure to respond by any entity shall be deemed an admission that the relief requested should be granted.

Also on April 25, 2005, the U.S. Trustee filed a complaint against Debtors, thereby commencing Adversary Proceeding No. 05-00048.[1]

Debtors failed to file a timely response to the U.S. Trustee's Motion to Dismiss and thus, on May 10, 2005, the Court entered an Order dismissing Debtors' case. Debtors promptly filed a Motion for Reconsideration on May 11, 2005. Debtor's May 11, 2005, Motion was denied for Debtors' failure to include the notice provision required by Mont. LBR 9013-1. Debtors refiled their Motion for Reconsideration on May 12, 2005. The U.S. Trustee filed an objection to Debtors' Motion for Reconsideration on May 16, 2005, and in accordance with this Court's Local Rules, the U.S. Trustee noticed Debtors' Motion for Reconsideration for hearing on June 28, 2005. Debtors filed a response to the U.S. Trustee's objection on May 23, 2005, and the U.S. Trustee responded thereto on May 24, 2005. Prior to the scheduled June 28, 2005, hearing, the

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[1] The U.S. Trustee filed an Adversary Complaint seeking the denial of Debtors' discharge under 11 U.S.C. § 727(a)(3), (4) and (5), based upon allegations of false oaths or accounts, withholding of information, failure to keep or preserve records and failure to explain loss of assets. The aforementioned Adversary Proceeding was dismissed on June 1, 2005, after the Court denied Debtors' Motion for Reconsideration filed in bankruptcy case number 04-62923.

Court conducted a pretrial scheduling conference in Adversary Proceeding 05-00048. During the pretrial scheduling conference, the parties stipulated that the facts set forth in Debtors' Motion for Reconsideration, the U.S. Trustee's objection thereto and the briefs filed by the parties could be used by this Court to render a decision on Debtors' Motion for Reconsideration. Consequently, the Court vacated the June 28, 2005, hearing and issued a Memorandum of Decision on June 1, 2005, denying Debtors' Motion for Reconsideration, reasoning:

> Applying the foregoing to the facts in the instant case, the Court finds that Debtors have not satisfied their burden under either F.R.B.P. 9023 or F.R.B.P. 9024. First, the Court finds that the facts set forth by Debtors' counsel in the request for reconsideration do not constitute newly discovered evidence. Furthermore, the facts do not establish that this Court committed clear error nor do they show that this Court made an initial decision that was manifestly unjust, or that there has been an intervening change in controlling law. Thus, amendment of the Court's May 10, 2005, Order [dismissing Debtors' bankruptcy] is not warranted under Rule 59.
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> Debtors' counsel argues that he misunderstood the UST's Motion to Dismiss because the UST filed both a Motion to Dismiss and a complaint to deny Debtors' discharge on the same date. Counsel's foregoing argument is not persuasive. The UST's Motion to Dismiss contains a clear and conspicuous Notice giving Debtors 10 days to respond to the request for dismissal. When Debtors failed to respond to the Motion to Dismiss and Notice, the Court, on the fifteenth day after the Motion to Dismiss was filed, entered an Order dismissing Debtors' case. The Court's Order of May 10, 2005, was premised on the Court's Local Rule that a failure to timely respond to any motion that has a 10-day Notice as provided by Mont. LBR 9013-1 is deemed an admission by the non-responding party that the averments in the motion are well taken and that the motion should be granted without further notice or hearing. Similar to the holding in *Smith v. Stone*, 308 F.2d [15], at 18 [9th Cir. 1962], the Court finds that counsel's failure to follow this Court's Local Rules does not constitute excusable neglect.

The Court's Order denying Debtors' Motion for Reconsideration is final and nonappealable.

The U.S. Trustee characterizes Debtors' efforts in filing a second bankruptcy as nothing

more than an attempt to do "an end-run around this Court's dismissal order by filing a new case." To paraphrase the U.S. Trustee, the question before the Court is whether Debtors can defeat the dismissal of their prior bankruptcy under 11 U.S.C. § 707(b) by merely filing another bankruptcy petition. Under the circumstances of this particular case, the Court finds that Debtors are permitted to file another Chapter 7 bankruptcy petition.

Neither the U.S. Trustee nor Debtors cite any case authority for their respective positions. In fact, the U.S. Trustee's Motion to Dismiss merely requests that the Court dismiss this "case pursuant to 11 U.S.C. § 707(b) and F.R.B.P. 1017(e), because the granting of relief to the above-named debtors would be a substantial abuse of the provisions of chapter 7." The Memorandum that accompanied the U.S. Trustee's Motion to Dismiss contains little more than the Motion, but asserts that: "If all a party need do in the face of receiving an unfavorable ruling pursuant to Mont. LBR 9013-1(e) is simply re-file around whatever action has just been taken by the Court, Montana's local rule would have no teeth." Debtors, in response to the U.S. Trustee's skeletal argument for dismissal, counter that refiling a Chapter 7 bankruptcy petition is allowed under 11 U.S.C. § 349, that Debtors are not time-barred from filing another petition under 11 U.S.C. § 109(g), and that the doctrine of *res judicata* does not apply because this is a new action. Neither the U.S. Trustee's Reply Memorandum filed August 5, 2005, nor Debtors' Second Reply to Trustee's Objection filed September 2, 2005, add anything new to the arguments previously espoused by the parties in their earlier Memoranda.

While the Court disagrees with Debtors' statement that the doctrine of *res judicata* does not apply because this is a new action, the Court does agree, for other reasons, that neither the doctrine of *res judicata* nor the doctrine of collateral estoppel apply under the circumstances of

this case.[2] In *Rein v. Providian Fin. Corp.,* 270 F.3d 901, 1098, 1099 (9th Cir. 2001), the Ninth Circuit Court of Appeals ("Ninth Circuit"), in discussing *res judicata*, wrote:

> *Res judicata*, or claim preclusion, provides that a final judgment on the merits of an action precludes the parties from relitigating all issues connected with the action that were or could have been raised in that action. *See In re Baker*, 74 F.3d 906, 910 (9th Cir.1996). Claim preclusion is appropriate where: (1) the parties are identical or in privity; (2) the judgment in the prior action was rendered by a court of competent jurisdiction; (3) the prior action was concluded to a final judgment on the merits; and (4) the same claim or cause of action was involved in both suits. *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 713 (9th Cir.2001); *Siegel v. Federal Home Loan Mortgage Corp.*, 143 F.3d 525, 528- 29 (9th Cir.1998).

As to the closely related doctrine of collateral estoppel, or issue preclusion, the United States Bankruptcy Appellate Panel for the Ninth Circuit explained that:

> Issue preclusion generally requires that there be: (1) the same issue; (2) actually litigated and determined; (3) by a valid and final judgment; (4) as to which the determination is essential to the judgment. RESTATEMENT (SECOND) OF JUDGMENTS § 27; *Robi v. Five Platters, Inc.,* 838 F.2d 318, 322 (9th Cir.1988).

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[2] With regard to the use of the terms of *res judicata* and collateral estoppel, *In re Paine*, 283 B.R. 33, 38-39 (9th Cir. BAP 2002), explains:

> When we refer to "principles of res judicata," we are generically referring to the preclusive effects of former litigation. *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 77 n. 1, 104 S.Ct. 892, 79 L.Ed.2d 56 (1984); *Hiser v. Franklin*, 94 F.3d 1287, 1290 (9th Cir.1996).
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> The genre of res judicata principles subsumes two conceptual categories. First, "claim preclusion" includes doctrines of merger and bar that foreclose litigation of matters that have never been litigated and has often been called "res judicata" in a non-generic sense. Second, "issue preclusion," although often called "collateral estoppel," actually includes doctrines of direct estoppel and of collateral estoppel that foreclose relitigation of matters that have been litigated. *Migra*, 465 U.S. at 77 n. 1, 104 S.Ct. 892; *Hiser*, 94 F.3d at 1290; *Duncan v. United States (In re Duncan)*, 713 F.2d 538, 541 (9th Cir.1983); RESTATEMENT (SECOND) OF JUDGMENTS §§ 24 (introductory note) & 27 (comment b); 18 WRIGHT & MILLER § 4402 ("The Terminology of Res Judicata").

In re Paine, 283 B.R. 33 (9th Cir. BAP 2002). As to the application of issue preclusion, *In re Gottheiner*, 703 F.2d 1136, 1139 (9th Cir. 1983), teaches:

> Collateral estoppel will preclude relitigation of issues that have already been litigated in and were necessary to a prior judgment. *Parklane Hoisiery Co. v. Shore*, 439 U.S. 322, 326 n.5, 99, S.Ct. 645, 649 b.5, 58 L.Ed.2d 552 (1979); *Mendoza v. United States*, 672 F.2d 1320, 1325 (9th Cir. 1982). Its use as a means of avoiding needless litigation is left to the broad discretion of the trial court. *Id.*

In re Palmer, 207 F.3d 566, 568 (9th Cir. 2000), further holds that "a default judgment is generally not entitled to collateral estoppel effect because there is no actual litigation of issues. *See In re Gottheiner*, 703 F.2d 1136, 1140 (9th Cir. 1983); *see also In re Raynor*, 922 F.2d 1146, 1150 (4th Cir. 1991); *Lombard v. Axtens*, 739 F.2d 499, 502 (10th Cir. 1984)." As explained by the Eleventh Circuit Court of Appeals in *In re Bush*, 62 F.3d 1319 (11th Cir. 1995), the "general federal rule . . . is [that] [o]rdinarily a default judgment will not support the application of collateral estoppel because '[i]n the case of a judgment entered by confession, consent, or default, none of the issues is actually litigated.' Restatement (Second) of Judgments § 27 cmt. E (1982)." Furthermore, the party seeking to preclude relitigation of an issue has the burden of showing that the same issue was "actually and necessarily determined"in a prior litigation. *Connors v. Tanoma Mining Co., Inc.*, 953 F.2d 682, 684 (U.S.App.D.C. 1992).

Palmer, supra, is a case that originated in this Court and the factual background is instructive. In *Palmer*, the Internal Revenue Service ("IRS") issued two Notices of Deficiency against the debtors. One Notice of Deficiency asserted a negligence penalty while the other Notice of Deficiency asserted a fraud penalty. The debtors petitioned the United States Tax Court for a redetermination of their liability. In response, the IRS filed an answer and affirmatively alleged that a portion of the debtors' deficiency was attributable to fraud. When

debtors failed to respond to the IRS' answer, the IRS petitioned the Tax Court for an Order Under Rule 37(c). The Tax Court granted the IRS' motion stating that the affirmative allegations of fact were deemed admitted. Subsequently, the Office of the Clerk of the Tax Court sent the debtors a notice, apprising them of the Order and informing the debtors that the affirmative allegations were deemed admitted and that if they wished to object, they would have to submit a Motion to Vacate and explain their failure to respond. The debtors took no action. The IRS subsequently moved for Summary Judgement, which the Tax Court granted in an Order and Decision, and Memorandum Sur Order. The Tax Court specifically found that the debtors' tax deficiencies were attributable to fraud.

Thereafter, the debtors in *Palmer* filed a voluntary bankruptcy petition. The debtors included a debt owing to the IRS in their schedules, a portion of which was the same debt that was at issue in the Tax Court proceeding. Debtors then filed a Complaint to Determine Dischargeability, requesting that their tax debt be discharged pursuant to 11 U.S.C. § 523(a)(1).

Based upon the foregoing facts, this Court found that by following specific procedural requirements, the IRS successfully reduced the claim of fraud to judgment. This Court thus concluded that the principles of collateral estoppel prohibited this Court from redetermining the issue of fraud.

On appeal, the Ninth Circuit Court of Appeals disagreed with this Court's application of the doctrine of collateral estoppel, holding that the fraud ruling against the Palmers was nothing more than "the product of a default." *Id.* at 568. The Court in *Palmer* went on to explain:

> The government argues that Palmer is in no different position from a litigant who loses a summary judgment motion because of a failure to controvert affidavits submitted in support of the motion. The government relies on

> *Gottheiner*. But the usual summary judgment comes after a greater degree of participation and involvement by the losing party than was the case with Palmer. *Gottheiner* is an example:
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> > Gottheiner did not simply give up from the outset. For sixteen months he actively participated in litigation on behalf of himself and CCHCS. That after many months of discovery Gottheiner decided his case was no longer worth the effort does not alter the fact that he had his day in court.
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> *Gottheiner*, 703 F.2d at 1140. Palmer, of course, did give up at the outset. He did not engage in any obstructive tactics that might result in collateral estoppel "without completion of the usual process of adjudication." *In re Daily*, 47 F.3d 365, 368 (9th Cir.1995); *see also In re Bush*, 62 F.3d 1319, 1324 (11th Cir.1995) (giving preclusive effect to a default judgment entered as a sanction against party who had "engaged in dilatory and deliberately obstructive conduct"). He did nothing. Whatever may be said about the preclusive effect of the usual summary judgment, Palmer's "deemed admissions" came at too incipient a stage of litigation that he had abandoned at the outset to permit a conclusion that the fraud issue was "actually litigated."

The dismissal of Debtors' prior bankruptcy, which is nothing more than entry of default after Debtors failed to respond to the U.S. Trustee's Motion to Dismiss, was litigated no more than the Palmers' default was in the Tax Court, where the Tax Court found their tax deficiencies were attributable to fraud based on allegations of fact which were deemed admitted after the Palmers failed to file a responsive pleading. To borrow the language from the Ninth Circuit's decision in *Palmer*, the dismissal of Debtors' prior bankruptcy "came at too incipient a stage of litigation" to permit this Court to conclude that the issues raised by the Trustee under 11 U.S.C. § 707(b) were "actually litigated."

Similarly, the doctrine of collateral estoppel does not preclude these Debtors from filing a second Chapter 7 bankruptcy petition in an attempt to discharge virtually the identical debts that were listed in their prior bankruptcy case. The United Sates Supreme Court explains that: "Under *res judicata*, a final judgment on the merits bars further claims by parties or their privies

based on the same cause of action. *Cromwell v. County of Sac*, 94 U.S. 351, 352, 24 L.Ed. 195 (1877); *Lawlor v. National Screen Service Corp*., 349 U.S. 322, 326, 75 S.Ct. 865, 867, 99 L.Ed. 1122 (1955); 1B J. Moore, Federal Practice ¶ 0.405[1], pp. 621-624 (2d ed. 1974) (hereinafter 1B Moore); Restatement (Second) of Judgments § 47 (Tent. Draft No. 1, Mar. 28, 1973) (merger); id., § 48 (bar)." *Montana v. United States*, 440 U.S. 147, 153, 99 S.Ct. 970, 973, 59 L.Ed.2d 210 (1979).

Arguably, no dispute exists that the parties in the instant proceeding are identical to the parties in Debtors' prior bankruptcy, namely, Debtors and the U.S. Trustee; that the judgment in the prior action was rendered by a court of competent jurisdiction; or that the U.S. Trustee's reason for seeking dismissal of this case is identical to those set forth in Debtors' prior bankruptcy.[3] The sole issue in this case with respect to *res judicata* is whether the Order of Dismissal entered by this Court in Debtors' prior bankruptcy equates to a judgment on the merits. The case of *In re Schimmels*, 127 F.3d 875, 884 (9th Cir. 1997) instructs:

> An involuntary dismissal generally acts as a judgment on the merits for the purposes of *res judicata*, regardless of whether the dismissal results from procedural error or from the court's considered examination of the plaintiff's substantive claims. *See In re Daily*, 47 F.3d 365, 368-69 (9th Cir. 1995); *Appeal of Herzog*, 953 F.2d 317 (7th Cir. 1992); *In re Gottheiner*, 703 F.2d 1136, 1140 (9th Cir. 1983).

What is interesting about the above statement made by the Ninth Circuit is that *In re Daily* and *In re Gottheiner* discuss solely the doctrine of collateral estoppel. Not once is the term *"res*

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[3] The Court presumes that the underlying reason for dismissal of this case would be the same as before. The Court notes that the U.S. Trustee seeks dismissal of this case on the basis that the previous case was dismissed for cause. The U.S. Trustee alleged in the prior case that Debtors gave false oaths or accounts, withheld information, failed to keep or preserve records and failed to explain a loss of assets.

judicata" mentioned in either *Daily* or *Gottheiner*. Moreover, this Court disagrees that *In the Matter of Kroner (Appeal of Herzog)* supports the proposition it is cited for in *Schimmels*. In particular, the applicable discussion of *res judicata* in *Kroner (Appeal of Herzog)* is as follows:

> Herzog argues that in light of *Barnett,* the prior dismissal with prejudice of his core proceeding is ineffective to preclude the current claim, for his second claim is not a core proceeding and his consent to the bankruptcy court's jurisdiction over the non-core proceeding fails to distinguish this case from *Barnett*. In making his argument, the trustee overlooks the basic rationale of *res judicata* --that there must be an end to litigation, and that end naturally follows the conclusion of a full and fair opportunity to litigate the claim and all aspects thereof. As the Supreme Court has stated: "A final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Federated Dept. Stores, Inc. v. Moitie*, 452 U.S. 394, 398, 101 S.Ct. 2424, 2428, 69 L.Ed.2d 103 (1981). In *Federated Department Stores*, the Court further noted that " 'public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties.' " *Id.*, 452 U.S. at 401, 101 S.Ct. at 2429 (quoting *Baldwin v. Traveling Men's Assn*., 283 U.S. 522, 525, 51 S.Ct. 517,518, 75 L.Ed. 1244 (1931)). Since bankruptcy courts are without jurisdiction to enter final judgments in non-core proceedings, absent the consent of the parties, a bankruptcy court's judgment in a core proceeding naturally has no effect on a party who brings a subsequent non-core action in the district court because he has not consented to the bankruptcy court's jurisdiction over the claim. Thus, the bankruptcy court's disposition of a core matter fails to provide a full and fair opportunity to litigate a non-core claim that is not subject to the bankruptcy court's jurisdiction.

In the Matter of Kroner (Appeal of Herzog), 953 F.2d at 320.

This Court does not believe that *Kroner (Appeal of Herzog)* sheds light on the meaning of "judgment on the merits". However, after reading *Schimmels*, it appears that the Ninth Circuit equates "actively litigated" and "judgment on the merits". If this is indeed the case, then there has not been a "judgment on the merits" for reasons stated earlier in this Memorandum of Decision.

Next, Debtors maintain that 11 U.S.C. § 349 does not specifically preclude them from

refiling their Chapter 7 bankruptcy case. Section 349(a) provides: "Unless the court, for cause, orders otherwise, the dismissal of a case under this title does not bar the discharge, in a later case under this title, of debts that were dischargeable in the case dismissed, nor does the dismissal of a case under this title prejudice the debtor with regard to the filing of a subsequent petition under this title, except as provided in section 109(g) of this title."

11 U.S.C. § 109(g)(1) provides:

> [N]o individual or family farmer may be a debtor under this title who has been a debtor in a case pending under this title at any time in the preceding 180 days if–
>
> > (1) the case was dismissed by the court for willful failure of the debtor to abide by order of the court, or to appear before the court in proper prosecution of the case.

The language of § 109(g)(1) is clear and unambiguous. If the dismissal of a debtor's bankruptcy is attributable to either the debtor's willful failure to abide by an order of the court, or the debtor's failure to properly prosecute a case, then the debtor is prohibited from filing another bankruptcy petition for 180 days. In discussing § 109(g), 2 LAWRENCE P. KING, COLLIER ON BANKRUPTCY, § 109.08 (15th ed.1997), explains:

> [S]ection 109(g) prevents certain tactics on the debtor's part that could be deemed abusive, and was enacted to prevent debtors from using repetitive filings as a method of frustrating creditor's efforts to recover what is owed to them. The debtor who willfully fails to appear as required or disobeys the court's orders and suffers dismissal of the case as a result is explicitly prevented from immediately filing another petition; under such circumstances, immediate refiling would thwart the court's effort to preserve its authority.

It is quite obvious from the facts that Debtors, by failing to timely respond to the U.S. Trustee's Motion to Dismiss filed in their prior bankruptcy, failed to appear in proper prosecution of their case. Thus, the Court's inquiry turns to whether such failure to appear in proper prosecution of their case was willful. The reasoning set forth in *In re Welling*, 102 B.R. 720 (Bankr. S.D.Iowa

1989), is instructive and teaches that an intentional, knowing and voluntary disregard of a court order constitutes a "willful failure" under § 109(g)(1). Following the foregoing, the dispositive issue is whether Debtors' intentionally, knowingly and voluntarily failed to respond to the U.S. Trustee's Motion to Dismiss. It is apparent to this Court that Debtors fully intended to respond to the U.S. Trustee's prior Motion to Dismiss, but failed to do so simply because of ineffective assistance of counsel. While Debtors' counsel's actions, or inactions as they may be, may rise to the level of negligent disregard for this Court's Local Rules, it certainly does not meet the standard for willful.

As previously noted, the U.S. Trustee's request for dismissal is based upon 11 U.S.C. § 707(b) which grants a bankruptcy court discretion to dismiss a Chapter 7 bankruptcy case when an individual has primarily consumer debt and where the Court finds that granting relief would be a substantial abuse of the provisions of Chapter 7 of the Bankruptcy Code. Section 707(b) provides in relevant part:

> After notice and a hearing, the court, on its own motion or on a motion by the United States trustee, but not at the request or suggestion of any party in interest, may dismiss a case filed by an individual debtor under this chapter whose debts are primarily consumer debts if it finds that the granting of relief would be a substantial abuse of the provisions of this chapter. There shall be a presumption in favor of granting the relief requested by the debtor.

In re Price, 353 F.3d 1135, 1138 (9th Cir. 2004); *In re Padilla*, 222 F.3d 1184, 1193-94 (9th Cir. 2000).

The history of 11 U.S.C. § 707(b) demonstrates that § 707(b) "was intended as the mechanism by which the court or the United States trustee could address general concerns regarding discharge of consumer debt" by debtors. *Padilla*, 222 F.3d at 1194. As noted by the

Court in *Price*, "Congress added this section to the Code 'in response to concerns that some debtors who could easily pay their creditors might resort to chapter 7 to avoid their obligations.'" *Price*, 353 F.3d at 1138, *quoting* 6 COLLIER ON BANKRUPTCY ¶ 707.04 at 707-15. Indeed, this Court noted in a prior case that 11 U.S.C. § 707(b) was "enacted to impose a restraint on consumer debtors' access to Chapter 7 discharge by interposing bankruptcy courts as gatekeepers who could examine the worthiness of debtor petitions and dismiss those petitions deemed abusive." *In re Stiff*, 17 Mont. B.R. 474, 477 (Bankr. D. Mont. 1999) (quoting *First USA v. Lamanna (In re Lamanna)*, 153 F.3d 1, 3 (1st Cir. 1998)).

The intent of dismissal for substantial abuse is to uphold creditors' interests in repayment "where such repayment would not be a burden" and if debtors can meet their debts without difficulty. *Kelly*, 841 F.2d at 914; *Gomes*, 220 B.R. at 87. The U.S. Trustee simply has not provided this Court with any reason, either statutory or otherwise, to preclude these Debtors from filing a second bankruptcy petition. However, because of the procedural posture of this case, the U.S. Trustee has also not had an opportunity to prove his allegations that Debtors' bankruptcy should be dismissed for cause under 11 U.S.C. § 707(b) due to Debtors' "substantial credit card obligations, exceeding their ability to repay and incurred for the purpose of gambling" as set forth in the U.S. Trustee's Memorandum. This Court will not preclude the U.S. Trustee from having the opportunity to prove his assertions after a hearing on the merits. Accordingly, the U.S. Trustee shall have ten days from the date of this Memorandum of Decision to amend his Motion to specifically include the allegations that were set forth in the U.S. Trustee's Motion to Dismiss filed in Debtors' prior bankruptcy. A hearing on the U.S. Trustee's Amended Motion to Dismiss will be held October 18, 2005. In accordance with the foregoing,

IT IS ORDERED that the Court will enter a separate order granting the United States Trustee ten (10) days from the date of this Order to amend the Motion to Dismiss; and scheduling a hearing on the United States Trustee's Amended Motion to Dismiss, if one is filed, for **Tuesday, October 18, 2005, at 09:00 a.m., or as soon thereafter as the parties can be heard, in the 5TH FLOOR COURTROOM, FEDERAL BUILDING, 316 NORTH 26TH, BILLINGS, MONTANA.**

BY THE COURT

HON. RALPH B. KIRSCHER
U.S. Bankruptcy Judge
United States Bankruptcy Court
District of Montana